90-702

Supreme Court, U.S.
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No.

IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1990

SHARON E. COOK,
Petitioner,

v.

BARRATT AMERICAN, INC., and
MICHAEL ANGELINI,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Arbitration Act, 9 U.S.C. sections 1 *et seq.*, requires an employee who has entered into a private employment contract containing a mandatory arbitration clause to submit an employment discrimination claim to arbitration?

2. Whether the California Supreme Court and Court of Appeal erroneously distinguished between claims brought under Title VII and its parallel state statutory scheme by compelling arbitration for claims fortuitously brought under one set of laws and not the other despite the work-share agreement between the laws' respective federal and state agencies?

3. Whether the California Supreme Court and Court of Appeal erred in compelling parties to arbitrate under the Federal Arbitration Act despite the conspicuous absence of any evidence offered by Appellant at any stage of the litigation establishing the jurisdictional foundation requirement of involvement in interstate commerce, and despite Respondents' own admission that it builds homes in the state of California only?

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No.

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SHARON E. COOK,
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BARRATT AMERICAN, INC., and
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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

Sharon E. Cook (hereinafter "Cook"), through her undersigned counsel, hereby petitions for a writ of certiorari to review the opinion of the Court of Appeal of California, Fourth Appellate District.

OPINIONS BELOW

The order of the California Supreme Court denying Cook's petition for review (App. A) is not reported. The opinion of the Court of Appeal, Fourth Appellate District, Division One, State of California, reversing the judgment of the Superior Court of San Diego County (App. B) was initially reported at 219 Cal.App. 3d 1004 (1990), but has been de-published by the California Supreme Court. The order of the Superior Court of San Diego County is not published (App. C).

JURISDICTION

The order of the California Court of Appeal was entered on April 23, 1990 (App. B). The order denying review was entered by the California Supreme Court on July 11, 1990 (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(a).

STATUTORY PROVISIONS INVOLVED

This case involves California Government Code sections 12940 *et seq.*; Title VII of the Civil Rights Act of 1964, 42 U.S.C. sections 2000e, *et seq.*; and 9 U.S.C. sections 2 and 4. These are reprinted in pertinent part in Appendix E.

CONCISE STATEMENT OF THE CASE

This case presents a question of first impression to the court, whether an arbitration

agreement under a private employment contract can be used to compel arbitration of an employment discrimination claim.

In April, 1986, Barratt American Inc. (hereafter Barratt) hired Sharon Cook as a full-time, new home sales representative. At that time, Sharon was single. On August 1, 1986, Sharon signed a standard one-year employment contract which included an arbitration provision. Sharon discovered she was pregnant on January 28, 1987 and continued to work for Barratt.

The discriminatory treatment began after Barratt management learned of Sharon's pregnancy. On February 20, 1987, Brian Angelini, Barratt's Director of Sales and Marketing, told Steve Cook, Sharon's husband, that "I can't have pregnant women on the work site. After June [1987], Sharon is going into resales. Michael Pattinson [Barratt's Divisional President] also has a big problem with her being pregnant." Brian Angelini threatened to fire Sharon if she did not transfer to Barratt Realty (resales), and then proceeded to harass Sharon for objecting to the transfer. The harassment included materially changing the terms and conditions of Sharon's employment. Barratt gave Sharon's Sunday shift to a new agent, and excluded her from standard sales meetings. Also, Barratt hired a third salesperson to work on the job-site when the standard practice was for only two salespeople to work at one site.

On March 4, 1987, as a result of the harassment, Sharon filed a dual Charge of Sex Discrimination based on pregnancy with both the

Equal Employment Opportunity Commission (EEOC) and the Department of Fair Employment and Housing (DFEH). Appellant, Barratt, responded to the Charge on March 30, 1987, and participated in the EEOC investigation of the Charge without disclosing an intent to arbitrate the pregnancy claim.

Barratt thereafter retaliated against Sharon for filing charges with the EEOC/DFEH and refused to renew Sharon's employment contract as a new home sales representative. Barratt only offered Sharon a four-month written contract as a sales representative with Barratt Realty (resales) which expired on December 31, 1987 at which time Barratt made no other offer for employment of any type to Sharon.

On May 13, 1988, after receiving notice from the DFEH of her right to bring a civil suit in state court, Sharon and her husband, Steve, filed a Complaint in the San Diego County Superior Court. The Complaint alleged a statutory cause of action for pregnancy discrimination and two common law causes of action for constructive discharge and intentional infliction of emotional distress naming Barratt American, Inc., Brian Angelini, and Michael Pattinson as Defendants. On August 24, 1988, Plaintiffs dismissed their two common law claims and Michael Pattinson as a party Defendant from their Complaint which left only Sharon's pregnancy discrimination claim against Defendants Barratt and Brian Angelini.

On September 6, 1988, Barratt filed a Motion to Compel Arbitration and Stay Court Proceedings relying on the Federal Arbitration Act (hereafter

FAA) and California law. The court heard the motion on October 11, 1988 and considered the recent decision of *Swenson v. Management Recruiters, Inc.* 858 F.2d 1304 (8th Cir.1988). Finding the authority in *Swenson* persuasive, the court denied Barratt's motion on October 27, 1988 and held that Cook's independent statutory discrimination claim was exempt from arbitration under the FAA (App.C). The Court of Appeal reversed this decision on April 23, 1990 (App. B).

On June 4, 1990 Cook filed a petition for review with the California Supreme Court. The petition was denied on July 11, 1990 (App. A), and this Petition followed.

REASONS FOR GRANTING THE PETITION

I.

THE COOK DECISION HAS CREATED IRRECONCILABLE DIFFERENCES BETWEEN THE STATE AND FEDERAL COURTS AND BETWEEN STATE COURTS ON IMPORTANT FEDERAL QUESTIONS.

The California Supreme Court, in denying Cook's Petition for Review, thereby affirming the Fourth District Court of Appeal, Division One, rejected well-established federal court precedent construing Title VII and the FAA. The *Cook* decision holds employees must arbitrate their state employment discrimination claims of sex discrimination under private employment agreements which contain arbitration clauses. *Cook v. Barratt*

American, Inc., (App. B), disapproving *Swenson v. Management Recruiters International, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, 110 S.Ct. 143; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine v. Arkansas Best Freight System, Inc.*, 450 U.S. 728 (1981). Less than one month earlier, the California First District Court of Appeal, Division Five, adopted the same federal court precedent rejected in *Cook*. In *Hall v. Nomura Securities International*, 219 Cal.App.3d 43 (Ct.App. 1990), the court held employees need not arbitrate their state employment discrimination claims under private employment agreements if the right in issue is protected under Title VII. *Cook* and *Hall* balanced the same competing fundamental and substantive Congressional policies, but yet came to inconsistent results because of the "inherent conflict between arbitration and the underlying purposes of Title VII." *Swenson*, 858 F.2d at 1306.

The *Cook* court quoted policy arguments from cases which compelled arbitration[1]: "'Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" *Cook*, 219 Cal.App.3d at 1009, citing *Perry v. Thomas*, 482 U.S. 483, 489 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). "'[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitration tribunals inhibited the development of arbitration as an alternative means of

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[1]None of these cases dealt with rights protected by Title VII or state employment discrimination laws.

dispute resolution.'" *Cook*, 219 Cal.App.3d at 1010, citing *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626-627 (1985).

Many federal courts, however, have favored judicial adjudication of discrimination claims over arbitration upon consideration of Title VII's legislative intent. The First Circuit of the United State Court of Appeals found the Eighth Circuit's *Swenson* analysis compelling, stating "an employee cannot waive prospectively her [Title VII] right to a judicial forum at any time, regardless of the type of employment agreement which she signs." *Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 187 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 842. The First Circuit reached this conclusion only after extensively reviewing United States Supreme Court precedent establishing the policy of giving deference to arbitration agreements. "Notwithstanding this policy, however, the Court has done nothing to disturb its prior ruling in *Alexander* that arbitration agreements do not preclude an independent right of access to a judicial forum for resolution of Title VII claims." *Utley*, 883 F.2d 186.

The Fifth Circuit also expressly endorsed the *Swenson* analysis. In denying a Motion to Dismiss and Compel Arbitration, the Court held an arbitration clause in a private employment contract requiring arbitration of any controversy arising out of employment, including termination, could not be enforced to compel arbitration of a Title VII sex discrimination suit. *Alford v. Dean-Witter Reynolds, Inc.*, 712 F.Supp. 547 (S.D.Tex. 1989).

The Third Circuit addressed the "inherent compatibility of the [employment discrimination] statute with arbitral enforcement and remedies", and concluded that Congress did not intend to preclude a claimant from access to a judicial forum in an age discrimination action brought under the ADEA. *Nicholson v. CPC International, Inc.*, 877 F.2d 221, 230 (3d Cir. 1989) (court approved of *Swenson* holding after determining it was sufficiently analogous to lend support to its proposition under age discrimination analysis).

The United States Supreme Court has repeatedly affirmed that discrimination claims are *not* waived by arbitration agreements. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine v. Arkansas-Best Freight System Inc.*, 450 U.S. 728 (1981) (concluded arbitration clause in collective bargaining agreement does not waive Title VII rights to judicial adjudication of discrimination claims).

In *Alexander*, the Supreme Court unanimously reversed a district court decision which held that the employee's statutory right to trial de novo under Title VII was foreclosed by arbitration. In doing so, the Court noted that federal policy favors arbitration, but recognized that Congress intended the courts to be ultimately responsible for enforcing Title VII, and "deferral to arbitral decisions would conflict with that

goal.[2]" *Swenson*, 858 F.2d at 1305, construing *Alexander*, 415 U.S. at 56.

> We think it clear there can be no prospective waiver of an employees rights under Title VII. . . . Title VII's strictures are *absolute* and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the [employment] bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

Alexander, 415 U.S. at 51-52 (Emphasis added).

In *Barrentine*, the Court noted that "[w]hile courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the...agreement, different considerations[3] apply where

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[2]The courts base this conclusion on "the lack of expertise of arbitrators and the inability of arbitration to judicially construe Title VII by reference to public law concepts," *Swenson*, 858 F.2d at 1307 construing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-57 (1974).

[3] These differences are emphasized by noted commentators who confirm discrimination and civil rights legislation have traditionally been viewed

the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Barrentine*, 450 U.S. at 737. These considerations presented in an employment discrimination claim have not been found preempted by the policies underlying the Federal Arbitration Act before the *Cook* decision. In fact, discrimination does not fall within or arise from employment. It is a public policy violation involving basic fundamental rights. Requiring arbitration in such cases would have the effect of requiring a party to submit a claim to arbitration that does not arise out of the employment agreement.

Several state courts have also taken a position in conflict with California. The New York courts have stated "[t]he rationale for the public policy exception [to compelling arbitration] is the possibility of inconsistent decisions by arbitrators who are not bound by law and may rely on their own sense of equity in matters of important public concern resulting in adverse consequences for the public in general." *Desapio v. Josephthal & Co., Inc.*, 540 N.Y.S.2d 932, 934 (Sup. Ct. 1989), construing *Matter of Aimcee Wholesale Corp.*, 21 N.Y.2d 621, 289

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differently than purely private economic disputes. R. Rotunda, J. Nowak & J. Young, Treatise on Constitutional Law: Substance and Procedure, sections 15.4, 15.7 (1986).

N.Y.S.2d 968, 237 N.E.2d 233 (1968). "A claim of sex discrimination is an issue which has been found to be a matter for the courts and not arbitration." *DeSapio*, 540 N.Y.S.2d 932, 934 (1989), construing *Matter of Wertheim & Co. v. Halpert*, 65 A.D.2d 724, 411 N.Y.S.2d 11, aff'd. 48 N.Y. 681, 421 N.Y.S.2d 876, 397 N.E.2d 386 (1979).

In refusing to compel arbitration of a state-based discrimination claim under a private employment agreement, a Minnesota court stated "we see no reason to have a different rule for state judicial remedies available under the [state statute] when that statute appears to be modeled after Title VII and the purposes of the two statutes are the same." *Anderson v. Dean Witter Reynolds, Inc.*, 449 N.W.2d 468 (Minn. App. 1989), construing *Hubbard v. United Press International, Inc.*, 330 N.W.2d 428, 441(Minn. 1983); *Danz v. Jones*, 263 N.W.2d 395, 398-300 (Minn. 1978). The *Anderson* court also extensively reviewed United States Supreme Court precedent favoring arbitration, but distinguished those cases as they did "not involve a cause of action under Title VII or a parallel state anti-discrimination law." *Anderson*, 449 N.W.2d at 470.

Because of the irreconcilable inconsistencies between state courts, and between the state and federal courts the *Cook* decision must be reviewed and reversed. Otherwise, parties to employment agreements will have no guidance as to what rights they are agreeing to relinquish by signing arbitration clauses.

II.

THE UNITED STATES CIRCUIT COURTS OF APPEAL ARE SPLIT ON WHETHER EMPLOYEES MAY BE COMPELLED TO ARBITRATE EMPLOYMENT DISCRIMINATION CLAIMS.

As stated above, the First, Third and Fifth Circuits have endorsed the holding of *Swenson* and ruled that arbitration clauses in a private employment contract which require arbitration of any controversy arising out of the employment, could not be enforced to compel arbitration of Title VII claims. See *Nicholson*, 877 F.2d 221; *Alford*, 712 F.Supp. 547; and *Utley*, 883 F.2d 184.

The Fourth Circuit, however, is not in accord with these other circuits. In *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990), the court expressly rejected the Third Circuit's holding in *Nicholson* stating "[w]e find the reasoning of the majority opinion in *Nicholson* unpersuasive, and therefore we have respectfully chosen not to follow it." *Id.* at 202. The court went on to compel an employee to submit an age discrimination claim to arbitration.

In light of this split between the various circuits, this Court should grant this petition so that guidelines for the lower courts may be established.

III.

THE *COOK* DECISION INCORRECTLY DISTINGUISHED BETWEEN DISCRIMINATION CLAIMS FILED UNDER TITLE VII AND THOSE FILED UNDER THE PARALLEL STATE STATUTORY SCHEME AND THUS DEBILITATED SUBSTANTIAL CONSTITUTIONAL RIGHTS ENSURING FREEDOM FROM GENDER DISCRIMINATION IN EMPLOYMENT.

The *Cook* opinion compels arbitration of employees who fortuitously bring their employment discrimination claims under the state anti-discrimination laws but does not compel arbitration of those who bring their claims through virtually identical federal anti-discrimination laws, i.e., Title VII. Not only does this decision adversely impact Cook's Constitutional right to litigate her claim, it lacks a logical foundation.

The *Cook* court held "federal law requires arbitration of this state-law-grounded claim of employment discrimination based on sex [Government Code 12940 et. seq.] under the privately negotiated arbitration agreement here in question." *Cook*, 219 Cal.App.3d 1004, 1016. However, the decision also concluded that an identical discrimination claim brought under the *federal* statute (Title VII) would not be similarly compelled to arbitration under private employment agreements. *Id.*

Considering the symbiotic function and purpose of Title VII and state statutory anti-discrimination laws, this opinion is particularly erroneous.

> Title VII contemplates substantial involvement of state procedures in the implementation of employment discrimination claims. Title VII provides for initial consideration of claims in state and local forums, and the EEOC may not process a charge of discrimination until the state remedy has been invoked and 60 days have passed, or until state proceedings have terminated.

Swenson, 858 F.2d at 1307 construing *Alexander*, 415 U.S. at 48-49; 42 U.S.C. Section 2000e-5(c) (1982). The *Cook* court itself recognized this relationship in quoting the United States Supreme Court: "'[S]tate fair employment practice laws are explicitly made part of the Title VII enforcement scheme.'" *Cook*, 219 Cal.App.3d at 1015 quoting *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 477 (1982).

In light of the work share agreement between the federal code and the state statutory scheme, it makes no sense to distinguish between the two by compelling arbitration in one instance and not the other. In *Salgado v. Atlantic Richfield*, 823 F.2d

1322[4] (9th Cir. 1987), the Ninth Circuit found that "the procedures and remedies of Title VII and the California FEHA are wholly integrated and related." *Id.* at 1326. In fact, Title VII and the FEHA have a "practical relationship," which is "embodied in the work sharing agreement between the EEOC and the Department of Fair Employment and Housing (DFEH). *Id.* at 1325-1326.

As the *Salgado* court pointed out, another fact which shows clearly that the DFEH and the EEOC work conjunctively in redressing discrimination claims is that "an investigation undertaken by the EEOC does not absolutely prohibit or prevent a party from proceeding with a court action under California's FEHA." *Id.* at 1326. Furthermore, since California is a deferral[5] state, failure to file dually with both the DFEH and the EEOC is fatal to a plaintiff's

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[4]Salgado brought suit in district court alleging wrongful termination based on employment discrimination and violations of both state and federal age discrimination laws. "Salgado filed his original complaint with the EEOC. The EEOC automatically filed the complaint with the Department [DFEH] under the agencies' work sharing agreement" authorized by Title VII. *Id.* 42 U.S.C. 2000e-5(c).

[5]An arrangement exists where after the filing of charges, the EEOC takes over the processing and investigation of the alleged discrimination charge from the state agency. Thus, the state agency procedures are replaced by the EEOC's.

ability to bring suit in court. "For the individual complainant residing in a deferral state, the initial pursuit of state administrative remedies is a mandatory step in the process of obtaining relief under Title VII." *Id.* at n.2.

The DFEH and the EEOC are inextricably intertwined in a congressionally mandated scheme meant to assure equal opportunities at the state and federal levels. The inference that there is no separation between the two agencies is made clear by the following: (1) the DFEH and the EEOC have a work share agreement authorized by Title VII (42 U.S.C. 2000e-5(c)); (2) there is a necessity of making a dual filing with both agencies in order to exhaust administrative remedies and bring suit, *Id.*; (3) California is a deferral state and complainants cannot exercise Title VII rights unless they also file a state claim with the DFEH, *Id.*; and, (4) the DFEH defers claims to the EEOC for purposes of conducting investigations.

Therefore, any perceived separation of the two agencies is merely a fiction, and the Court of Appeal's distinction on this basis is unfounded.

IV.

THE *COOK* DECISION MUST BE REVIEWED SINCE THE COURT OF APPEAL OVERLOOKED THE ABSENCE OF THE REQUISITE JURISDICTIONAL ELEMENT OF APPELLANT EMPLOYER'S INVOLVEMENT IN INTERSTATE COMMERCE BEFORE APPLYING THE FEDERAL ARBITRATION ACT, EVEN THOUGH THE EMPLOYER ADMITTED FACTS IN APPELLANT'S OPENING PAPERS THAT SHOW NO INTERSTATE COMMERCE WAS INVOLVED.

The Court of Appeal ordered arbitration according to the Federal Arbitration Act absent evidence of any involvement in interstate commerce. This jurisdictional error is especially egregious since appellant employer expressly conceded its business was that of selling homes in California. (See Excerpt from Petitioner's Opening Brief in the Court of Appeal, App. D.) Since "[t]he Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause,...[w]e therefore view the 'involving commerce' requirement...as a necessary qualification." *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1983), citing Bernhardt v. Polygraphic Co., 350 U.S. 198, 200-201 (1955).

In *McClain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1979), the Supreme Court stated: "jurisdiction may not be invoked under the statute unless the relevant aspect of interstate commerce is identified; it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of

interstate commerce." *Id.* at 242. To establish interstate commerce, *petitioner must demonstrate a substantial effect* on interstate commerce generated by Respondent's brokerage activity. *Id.* at 242 (before applying the Sherman Act which has the same jurisdictional prerequisite of interstate commerce, the Court determined petitioner made an extensive showing of involvement in interstate commerce). Barratt made no such demonstration at any stage of the litigation, yet the Court of Appeal applied the Act despite addressing this issue and noting the absence of this jurisdictional foundation.[6]

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[6]Note in denying Cook's Petition for Rehearing, the Court of Appeal stated this jurisdictional issue had been waived and cited *Parker v. City of Fountain Valley*, 127 Cal.App.3d 99, 117 (Ct. App. 1981), and *In re Joseph E.*,124 Cal.App.3d 653, 657 (Ct. App. 1981). However, neither of these cases dealt with jurisdictional issues. Thus, even if the issue had not been previously addressed, the question of jurisdiction may be raised for the first time on appeal since objections to jurisdiction cannot be waived. CCP Section 430.80; *Emery v. Pacific Employers Ins. Co.*, 8 Cal.2d 663; *Griffin v. Griffin*, 122 Cal.App.2d 92(Ct. App. 1953); see also, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 29 (1982) (Appellate Courts may decide the applicability of the FAA whether that exact issue is before it or not).

CONCLUSION

The Court of Appeal clearly erred in its disposition of the *Cook* case. The recent Eighth Circuit *Swenson* decision is the latest statement from the bench concerning the arbitrability of sex discrimination claims. There, the court expressly overruled the district court order compelling arbitration and found that state statutory rights which parallel Title VII are exempt from the FAA.

This decision harms the Cook's as well as deprives parties to employment agreements of any consistent guidance. This decision has created a split between the California courts and those of other states, as well as between the California courts and the U.S. Courts of Appeal. Additionally, a split exists within the United States Circuit Courts of Appeal.

The *Cook* decision has irrationally distinguished between parallel federal and state codes prohibiting employment discrimination and applied the FAA despite the apparent lack of involvement in interstate commerce. Arbitration is an inadequate forum for such claims and a waiver of judicial remedies is automatically precluded whether the claim is brought under Title VII or a parallel state anti-discrimination statute such as the FEHA. For these reasons this Petition for a Writ of Certiorari to the Supreme Court of the State of California should be

granted.

Respectfully submitted,

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[7]Marie Backes gratefully recognizes the research and drafting of Karl E. Sorenson, a recent graduate of the University of Denver College of Law.

APPENDIX A

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District, Division One,
No. D009230 - S015941

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SHARON E. COOK et al.,
Respondents,

v.

BARRATT AMERICAN INCORPORATED ETC. et al.,
Appellants.

Respondents' petition for review DENIED.

Mosk, J. and Broussard, J. are of the opinion the petition should be granted.

The reporter of Decisions is directed no to publish in the Official Appellate Reports the opinion in the above entitled appeal filed April 23, 1990, which appears at 219 Cal.App.3d 1004. (Cal. Const., Art. VI, Section 14; Rule 976, Cal Rules of Court.)

Dated: July 11, 1990 PANELLI

Acting Chief Justice

APPENDIX B

**COURT OF APPEAL,
FOURTH APPELLATE DISTRICT**

DIVISION ONE

STATE OF CALIFORNIA

SHARON E. COOK et al.,

Plaintiffs and Respondents,

v.

BARRATT AMERICAN, INC., etc., et al.,

Defendants and Appellants.

Filed April 23, 1990

Before: Todd, Acting P.J., Froelich and Nares, Judges.

Opinion by Todd, Acting P.J.

Appeal from the Superior Court of San Diego County

Robert E. May, Judge.

SUMMARY

After an employer required its home sales representative to transfer positions when she became pregnant, both the employee and her husband resigned their positions with the employer and filed an action for constructive discharge, intentional infliction of emotional distress, and violation of Gov. Code, section 12940 (employment discrimination based on sex). The employer moved to compel arbitration pursuant to an arbitration clause in the private employment agreement between plaintiffs and the employer. the employer contended that the Federal Arbitration Act (9 U.S.C.A. Section 1 et seq.) required that the arbitration clause be given effect. The trial court denied the motion. (Superior Court of San Diego County, No. 599183, Robert E. May, Judge.)

The Court of Appeal reversed the order denying the motion to compel arbitration. The court held that the Federal Arbitration Act (9 U.S.C.A. Section 1 et seq.) required that the arbitration clause be given effect. A United States Supreme Court case holding that a litigant is entitled to file his discrimination charge anew after an unsatisfactory result in arbitration was no a holding that the litigant is barred from arbitration in the first place. Further, the court held, the broadly worded statements in that case that there can be no prospective waiver of an employee's rights under Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. Section 2000e et seq.) and to the effect that arbitral decisions are less worthy than judicial decisions, were confined in their

application to the collective-bargaining process. The court also held that the employer did not waive its right to arbitration, even though it had answered and engaged in discovery without disclosing its intent to seek arbitration and had not asserted its right to arbitration during the pregnant employee's earlier proceedings before the Equal Employment Opportunity Commission and the state Department of Fair Employment and Housing.

COUNSEL

Latham & Watkins, David F. Faustman and Victoria L. Chaffin for Defendants Appellants.

Backes & Friesen and Marie A. Backes for Plaintiffs and Respondents.

OPINION

TODD, Acting P.J.:

Barratt American, Inc. Michael Pattison and Brian Angelini (collectively Barratt), defendants in the action of Sharon E. Cook and Steven D. Cook (collectively Cook) for damages based on the state statutory prohibition against sex discrimination in the Fair Employment and Housing Act (FEHA; Gov. Code, section 12900 et seq.), appeal an order denying Barratt's motion to compel arbitration and stay proceedings.

Barratt contends the Federal Arbitration Act (FAA) (9 U.S.C.A. section 1 et seq.) requires that the arbitration clause in the private employment agreement between Cook and Barratt be given effect. Finding merit in Barratt's contention, we reverse.

FACTS

The allegations underlying the action for damages are as follows: In April 1986 Barratt hired the then unmarried plaintiff, Sharon White, as a new home sales representative. In August 1986, Sharon signed a sales representative employment agreement with Barratt for a one-year term. The employment agreement contains an agreement to submit to arbitration [a]ny controversy between Broker [Barratt] and Salesperson [Cook] involving . . . the employment of Salesperson" with the decision of the arbitrators to be "final and conclusive."[1]

[1]The arbitration provision in the employment agreement reads as follows: "16.1 Any controversy between Broker and Salesperson involving the construction or application of any of the terms, provisions, or conditions of this Agreement, of the employment of Salesperson, shall on the written request of either party be submitted to arbitration and such arbitration shall comply with and be governed by the provisions of California Arbitration Act, beginning of Section 1280 of the California Code of Civil Procedure. The Broker and Salesperson shall each appoint one person to

In January 1987 Sharon discovered she was pregnant and continued to work for Barratt. In February 11987 Barratt's representative told Sharon's husband Barratt could not have pregnant women on the work site and Sharon would be going into resales in June. The representative threatened to fire Sharon if she did not transfer to resales and harassed her for objecting to the transfer. She was not allowed to work on Sundays and was ordered not to attend sales meetings held on Mondays. Barratt hired a third salesperson to work on the job site when its practice had been to have only two persons work at one site.

In March 1987 Sharon filed a charge of discrimination base on sex with the Equal Employment Opportunity Commission (EEOC) and the Department of Fair Employment and Housing. Barratt responded to the charge and participated in the EEOC investigation without asserting its intent to arbitrate the claim.

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hear and determine the dispute and if they are unable to agree, then the two persons so chosen shall select a third impartial arbitrator whose decision shall be final and conclusive upon both parties. The cost of arbitration shall be borne by the losing party or in shall proportion as the arbitrators shall decide."

In July 1987 Sharon and Barratt signed another employment agreement for a six-month term running through December 1987. The employment agreement contained an arbitration agreement identical to the original August 1986 agreement.

In December 1987 Steven Cook resigned his position followed shortly by Sharon.
In March 1988 EEOC gave Sharon a notice of right to sue.

Cook filed the present lawsuit in May 1988. The complaint alleges causes of action for constructive discharge, intentional infliction of emotional distress and violation of Government Code Section 12940 et seq., part of the FEHA.[2]

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[2]Government Code section 12940 provides in part: 'It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification . . . :

"(a) For an employer, because of the . . . sex of any person . . . to discriminate against such person in compensation or in terms, conditions or privileges of employment."

A similar, more detailed provision relating expressly to the condition of pregnancy, among other conditions, is contained in Government Code section 12945.

In *California Federal S. & L. Assn. v. Guerra* (1987) 479 U.S. 272, 292 [93 L.Ed.2d 613, 630-631,107 S.Ct. 683], the United States Supreme

Barratt answered and engaged in discovery without disclosing its intent to seek arbitration until August 1988. In September 1988 Barratt filed the motion to compel arbitration here under consideration.

On the date of the hearing on the motion to compel arbitration counsel informed the trial court that six days before the hearing the United States Court of Appeals for the Eighth Circuit had reversed a United States District Court decision compelling arbitration in a similar case. The trial court continued the hearing on the motion to compel arbitration, and after further briefing and argument, followed the Eighth Circuit's decision in *Swenson v. Management Recruiters Intern., Inc.* (8th Cir. 1988) 858 F.2d 1304, denying the motion.

Swenson held that "; ; ; Congress has articulated an intent through the text and legislative history of Title VII to preclude waiver of judicial remedies for violation of both federal Title VII rights and parallel state statutory rights, thereby exempting state statutes for the provisions of the Federal Arbitration Act." (858 F.2d at p. 1309.) Accordingly,

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Court held Government Code section 12945, subdivision (b)(2), providing for maternity leave, is no preempted by title VII of the Civil Rights Act of 1964, as amended by the federal Pregnancy Discrimination Act. (42 U.S.C.A. section 2000e et seq. and sections 2000e(k), 2000e-2(a) and (c)).

the employer in *Swenson* was denied arbitration of state-grounded sex and race discrimination claims in connection with Swenson's employment which was subject to a private, not collectively bargained agreement to arbitrate controversies.

In its ruling the trial court also found Barratt did not waive its right to seek to compel arbitration of the matter.

DISCUSSION

The determinative issue in this appeal is whether federal law precludes or requires arbitration, pursuant to the arbitration clause in the private contract here involved, of the state-law-founded claim of employment discrimination based on sex.[3] We are persuaded by recent United States Supreme Court decisions concerning the controlling effect to be given to arbitration clauses under the FAA that the privately negotiated arbitration agreement here under consideration is required to be enforced by an order compelling arbitration in the first instance. We are not persuaded by contrary conclusions reached in cases such as *Swenson v. Management Recruiters Intern., Inc., supra*, 858 F.2d 1304, relied on by the

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[3]In connection with this issue we consider only the matter of the arbitrability of the claim. Not within the scope of this discussion are other matters related to the subject of arbitration such as the procedure connected with, or binding effect of arbitration.

trial court; *Nicholson v. CPC Intern. Inc.* (3d Cir. 1989) 877 F.2d 221; or *Utley v. Goldman Sachs & Co.* (1st Cir. 1989) 883 F.2d 184.

The FAA, and particularly title 9, section 2,[4] creates a body of federal substantive law of arbitrability applicable to any arbitration agreement within the coverage of the FAA. (*Moses H. Cone Hosp. v. Mercury Const. Corp.* (1983) 460 U.S. 1, 24, [74 L.Ed.2d 765, 785, 103 S.Ct. 927], enforcing arbitration of a hospital construction contract dispute.) "'. . . Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial form for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" (*Perry v. Thomas, supra,* 482 U.S. at p. 489 [96 L.Ed.2d at p. 435, 107 S.Ct. at p. 2525],

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[4]Section 2 provides, in relevant part: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, of the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist t law or in equity for the revocation of any contract." (9 U.S.C.A. section 2.)

Section 4 mandates judicial enforcement of arbitration agreements where a party has failed, neglected, or refused to arbitrate. (9 U.S.C.A. section 4; see *Perry v. Thomas* (1987) 482 U.S. 483, 485, fn. 1 [96 L.Ed.2d 426, 432, 107 S.Ct. 2520, 2523].)

quoting *Southland Corp,. v. Keating* (1984) 465 U.S. 1, 10 [79 L.Ed.2d 1, 12, 104 S.Ct. 852].) It is the "clear federal policy [to require] arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable "upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. section 2." (Ibid., holding section 2 of the FAA preempts Cal. Lab. Code section 229 which provides in part that actions for the collection of wages may be maintained "without regard to the existence of any private agreement to arbitrate."1)[5] The federal policy is "to ensure the enforceability, according to their terms, of private agreements to arbitrate." (*Volt Info. Sciences v. Bd. of Trustees* (1989) 489 U.S. __, _

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[5]Until Cook filed a petition for rehearing in this case, there was no question raised that the employment contract involves interstate commerce and is not subject to revocation. In the petition for rehearing, for the first time in this case, Cook raises an issue about involvement in interstate commerce. (See *McLain v. Real Estate Bd. of New Orleans* (1979) 444 U.S. 232; cf. *Bernhardt v. Polygraphic Company of America* (1956 350 U.S. 198.) By Cook's silence on this point until the filing of the petition for rehearing, the question has been waived. (See *Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 117; *In re Joseph E.* (1981(124 Cal.App.3d 653, 657.).

_ [103 L.Ed.2d 488, 498, 109 S.Ct. 1248].)[6] There is no federal policy, however, favoring arbitration under a certain set of procedural rules. (*Ibid.*) Thus, it is clear that the FAA is applicable to California's courts in cases of contracts evidencing a transaction involving interstate commerce. (*Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1977) 67 Cal.App.3d 19, 25 [136 Cal.Rptr. 378].)

In May 1989 the United States Supreme Court observed "'the old judicial hostility to arbitration'" has eroded over the years and the erosion has intensified in its most recent decisions. (*Rodriguez De Quijas v. Shearson/American Exp., Inc.* (1989) 490 U.S. __, _ [104 L.Ed.2d 526, 534, 109 S.Ct. 1917].) *De Quijas* cites several examples of the shift in the court's views on arbitration, one of which is the "flat statement" in *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 628 [87 L.Ed.2d 444, 456, 105 S.Ct. 2246], that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial

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[6]*Volt Info. Sciences v. Bd. of Trustees* held that the FAA does not have a preemptive effect on the application of California Code of Civil Procedure section 1281.2, subdivision (c), permitting a court to stay arbitration pending resolution of related litigation, notwithstanding that no such stay was permissible under the FAA, where the parties agreed that their arbitration agreement would be governed by California law.

forum." (*De Quijas*, supra , 490 U.S. at p. __ [104 L.Ed.2d at p. 534].) *De Quijas* goes on to had rights under the federal Securities Act of 1933, previously held to be nonarbitrable under section 14 of that act, are arbitrable. *De Quijas* overrules a holding to the contrary in *Wilko v. Swan* (1953) 346 U.S. 427 [98 L.Ed.2d 168, 74 S.Ct. 182].

We observe that in *Mitsubishi, supra,* 473 U.S. 614, 626-627 [87 L.Ed.2d 444, 445], our highest court also states "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi* rejected arguments arbitration was inadequate based on the complexity of the claim, inadequate procedures and fear that arbitrators will not follow the statute and will fail to protect substantive rights. (See *Swenson, supra,* 858 F.2d 1304, 1307.) *Mitsubishi* held federal anti trust claims and remedies were arbitrable. Particularly significant to the present case is the statement in *Mitsubishi*: "We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial form, that intention will be deducible from text or legislative history." (*Mitsubishi, supra* 473 U.S. at p. 628 [87 L.Ed.2d at p. 456].)

In *Shearson/American Exp., Inc. v. McMahon* (1987) 482 U.S. 220, 227 [96 L.Ed.2d 185, 194, 107 S.Ct.2332], the same rule is expressed as follows: "If Congress did intend to limit or prohibit waiver of a

judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history,'[citing *Mitsubishi, supra*], or from an inherent conflict between arbitration and the statute's underlying purposes. [Citations.]"

Shearson/American Express Inc. v. McMahon, requiring arbitration of claims under the Securities Exchange Act of 19934 (15 U.S.C.A. section 1961 et seq.), also reiterates the rule that the "burden is on the party opposing arbitration... to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. [Citation.]" (482 U.S. at p.227 [96 L.Ed.2d at p.194].) Moreover, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver . . . ." (*Moses H. Cone Hosp. v. Mercury Const. Corp., supra*, 460 U.S. 1, 24-25 [74 L.Ed.2d at p. 785].)

Considering the strong federal policy to enforce arbitration agreements and the intensified erosion of judicial suspicion about the competence of arbitrators to provide for the parties' substantive rights in accord with the applicable law, and considering the absence if any indication is statutory text or history of a congressional indication of intent to preclude a waiver of judicial remedies at least in the first adjudicatory forum of arbitration, we have concluded Cook has not carried her burden of showing the matter is not arbitrable. The foregoing authorities lead to the result that arbitration of this case is compelled under the FAA.

While the trial court had before it an applicable decision in the *Swenson* case, *supra*, 858 F.2d 1304, we do not believe that case should be viewed as persuasive precedent. To reach its conclusion the court in *Swenson* relied primarily on the 1974 United States Supreme Court decision in *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36 [39 L.Ed.2d 147, 94 S.Ct 1011]. *Alexander* involved a race discrimination claim asserted under title VII of the Civil Rights Act of 1964. (42 U.S.C.A. section 2000e et seq.) Alexander's employment was subject to a collective bargaining agreement containing a broad arbitration clause including a multistep grievance procedure with the first four steps involving negotiations between the employer and the union and the last step being compulsory arbitration. (415 U.S. at pp.399-41 [39 L.Ed.2d at pp. 153-154].) Alexander went through the compulsory arbitration process as well as an EEOC determination with each body concluding he was not entitled to relief. The EEOC notified Alexander of his right to institute a civil suit in the federal court and he did so. (*Id.* at p. 43 [39 L.Ed.2d at p. 155].) The United States District Court granted the employer's motion for summary judgement and dismissed, holding the racial discrimination claim had been resolved adversely in the arbitration proceeding and Alexander, having voluntarily elected to pursue his grievance to final arbitration under the nondiscrimination clause of the collective bargaining agreement, was bound by the arbitral decision and thereby precluded from suing his employer under title VII. (*Ibid.*)

The United States Supreme Court reversed, holding "an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." (*Alexander, supra*, 415 U.S. at p.49 [39 L.Ed.2d at p. 158].) *Alexander* proceeded to discuss and dispose of contentions concerning such matters as election of remedies, waiver, the authority of arbitrators and the rectitude of a rule permitting the employee both an arbitral forum and a judicial forum for vindication of rights under title VII while affording the employer only the single, binding arbitral forum. (Id. r pp. 49-55 [39 L.Ed.2d at pp.158-162].) After discussing certain other matters, *Alexander* concluded: "[T]he federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*." (*Id.* at pp. 59-60 [39 L.Ed.2d at p. 165].)

Swenson focused on *Alexander's* statements concerning the nonwaivability of title VII rights[7] and

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[7]"[W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII.. . . Title VII's strictures are absolute and represent a congressional command

pointed out that although *Alexander* noted federal law favors arbitration, it recognized that the title VII scheme indicates that Congress intended federal courts to be ultimately responsible for enforcing title VII, and deferral to arbitral decisions would conflict with that goal. (*Swenson, supra, 858* F.2d at p. 1305.) *Swenson* further stated that *Alexander* observed "'the choice of forums inevitably affects the scope of the substantive right to be vindicated.'" (*Ibid.*, quoting Alexander, supra, 415 U.S. at p. 56 [39 L.Ed.2d at p. 163].) Based on this reading of *Alexander*, the court in *Swenson* concluded: "Although *Alexander* involves a collective bargaining agreement, and not a commercial arbitration agreement under the FAA, this fact should no change the Court's analysis. The *Alexander* Court was well aware that federal policy favors arbitration. *That decision turned not on the fact that a collective bargaining arbitration was involved, but instead on the unique nature of Title VII. Alexander* noted that 'Congress indicated that it considered the policy against discrimination to be of

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that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.'" (*Swenson, supra*, 858 F.2d at p. 1305, quoting *Alexander, supra*, 415 U.S. at pp. 51-52 [39 L.Ed.2d at p. 160].)

the "highest priority."" (*Swenson*, *supra*, 858 F.2d at p. 1306, italics added.)

Swenson continued, citing *Barrentine v. Arkansas-Best Freight System* (1981) 450 U.S. 728 [67 L.Ed.2d 641, 101 S.Ct. 1437], which adhered to the *Alexander* decision and held federal courts are not bound by arbitral decisions concerning wage claims under the Fair Labor Standards Act where the claim is submitted to arbitration under a clause in a collective bargaining agreement. (*Swenson*, *supra*, 858 F.2d at p. 1306.) *Swenson* emphasized the statement in *Barrentine* that "'different considerations apply where the employee's claim is based on rights arising our of a statute designed to provide minimum substantive guarantees to individual workers.'" (*Ibid.*, quoting *Barrentine*, *supra*, 450 U.S. at p. 737 [67 L.Ed.2d at p. 651].)

Swenson further cited statements in *Alexander* concerning the intent of Congress not to preempt federal judicial proceedings in discrimination cases by employment arbitration agreements enforceable under the FAA, its intent to prohibit waive of judicial forum and the inadequacy of arbitration "as a forum for the final resolution of rights created by Title VII." (858 F.2d at p. 1306) *Swenson* recognized the Supreme Court's more recent statements dismissing suspicions about the competence of arbitral tribunals, and concluded: "[I]n the passage of Title VII it was the congressional intent that arbitration is unable to pay sufficient attention to the transcendent public interest in the enforcement of Title VII. Title VII mandates the promotion of the public interest by

assisting victims of discrimination. The arbitration process may hinder efforts to carry out this mandate." (858 F.2d at p. 1307.)

Swenson's analysis proceeds to consider the application of Minnesota state antidiscrimination law and, among other things, noted that *Kremer v. Chemical Construction Corp.* (1982) 456 U.S. 461 [72 L.Ed.2d 262, 102 S.Ct. 1883] had held that in tile VII cases, federal courts are required to give res judicata effect to state court decisions in state law discrimination cases. (*Swenson, supra,* 85 F.2d at p. 1308.) *Kremer* focused on the important role of state law in enforcing the title VII scheme, as evidenced in the legislative history. That legislative history "evinces a congressional intent to allow individuals to pursue independently one's rights under other applicable state and federal statutes. Provisions in the text as well as in the legislative history demonstrate an explicit, mixed federal-state scheme of Title VII and a prominent state law role. *Alexander* makes clear that Congress intended the right in employment discrimination cases to have access to judicial remedies to outbalance the federal antidiscrimination system to defer to state systems where possible." (*Swenson, supra,* 858 F.2d at pp. 1308-1309, fn. omitted.)

Swenson cited certain Minnesota state statutes permitting investigation of discrimination charges and representation of victims in administrative and judicial proceedings. Again citing *Alexander, Swenson* said: "By giving individuals access to the state courts, the private litigant 'not only redresses his own injury

but also vindicates the important congressional policy against discriminatory employment practices.' [Citation.] As the Court stated, 'there solution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.' [Citation.]

"We conclude that Congress has articulated an intent through the text and legislative history of Title VII to preclude waiver of judicial remedies for violation of both federal Title VII rights and parallel state statutory rights, thereby exempting state statutes from the provisions of the Federal Arbitration Act. . . . "(858 F.2d at p. 1309.)

In *Utley v. Goldman Sachs & Co., supra,* 883 F.2d 184, the court followed *Swenson* and upheld a district court order denying a motion to stay all proceedings pending arbitration of a title VII claim under an arbitration clause in a private agreement known as a "Form U-4" agreement. A holding similar to *Swenson's* also was reached in *Nicholson v. CPC Intern. Inc., supra,* 877 F.2d 221, concluding federal statutory rights under the Age Discrimination in Employment Act of 1967 (29 U.S.C.A. section 621 et seq.) were not subject to compulsory arbitration under a private arbitration agreement. (Cf. *Gilmer v. Interstate/Johnson Lane Corp.* (4th Cir. 1990) 895 F.2d 195.)

While we have considered these authorities

carefully, we respectfully disagree with the conclusions they reach because we do not read the holdings of either *Alexander* or *Barrentine,* both of which involved an underlying arbitration in the first instance, as leading to the conclusion arbitration cannot be compelled as the first adjudication under the parties' private arbitration clause subject to the FAA.

The United States Supreme Court itself has said that *Alexander* "held that an arbitrator's decision pursuant to provisions in a collective-bargaining contract was not binding on an individual seeking to pursue his Title VII remedies in court." (*Electrical Workers v. Robbins & Meyers Inc.* (1976) 429 U.S. 229, 236 [50 L.Ed.2d 427, 435, 97 S.Ct. 441], italics added.) The same characterization applies to the holding in *Barrentine.* (See also *McDonald v. West Branch* (1984) 466 U.S. 284 [80 L.Ed.2d 302, 104 S.Ct. 1799], holding the doctrines of res judicata and collateral estoppel are inapplicable to arbitration of a civil rights claim brought under 42 U.S.C.A. section 1983 where the arbitration was pursuant to a collective bargaining agreement.)

In *Kremer, supra* 456 U.S. 461, 477 [72 L.Ed.2d 262, 277-278], the court sates in part: "The holding in [*Alexander v.*] *Gardner-Denver* was that a private arbitration decision concerning an employment discrimination claim did not bind the federal courts. Arbitration decisions, of course, are not subject to the mandate of section 1738. Furthermore, unlike arbitration hearings under collective bargaining agreements, state fair employment practice laws are

explicitly made part of the Title VII enforcement scheme." (Italics added.)[8]

The key features of the high court's characterization of *Alexander's* holding, as underscored, are the references to collective bargaining and the nonbinding effect of the arbitration determination of a Title VII claim. We view these references as authoritative limitations on the way *Alexander* should be read. Doing so, *Alexander* has no application to private agreements to arbitrate.

Alexander's holding the litigant is entitled to file his discrimination charge anew after an unsatisfactory result in arbitration is not a holding

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[8]*McDonald v. West Branch, supra*, 466 U.S. 284, 287-288 [80 L.Ed.2d 302, 306-307], explains the conclusion in *Kremer* that arbitration decisions are not subject to the mandate of 28 U.S.C. section 1738, the Federal Full Faith and Credit Statute, as follows "This conclusion follows from the plain language of section 1738 which provides in pertinent part that the 'judicial proceedings [of any court of any State] shall have the same full faith and credit in every court within the United States and its territories and Possessions as they have by law or usage in the courts of such State . . . from which they are taken.' (Italics added.) Arbitration is not a 'judicial proceeding' and, therefore, section 1738 does not apply to arbitration awards." (Fns. omitted.)

the litigant is barred from arbitration in the first place. those are two distinct subjects, the first encompassing concepts far different from the concepts of contractual rights and expectations of the parties involved in the matter of enforcing a private agreement to arbitrate. (See *Volt, supra,* 489 U.S. at p. __ [103 L.Ed.2d at p. 500] "By permitting the courts to 'rigorously enforce' such agreements according to their terms, see *Byrd*, 470 U.S. at 221, 105 S.Ct., at 1242, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by [*sic*] the FAA>") In this case the parties were free to bargain for arbitration and they did so. Their private bargain should be fulfilled.

Here there is no cause for concern that deficiencies in the arbitrators' expertise will adversely impact on the important rights involved in the case. As *Mitsubishi* teaches, the parties arbitrating the statutory claim under a private arbitration agreement do "not forgo the substantive rights afforded by the statute," (473 U.S. at p. 628 [87 L.Ed.2d at p. 456]) and the time has long since passes that we are to consider the arbitral forum deficient. (Id. at pp. 626-627 [87 L.Ed.2d at pp. 454-456].) In light of this post-*Alexander* guidance from the United States Supreme Court, it is appropriate to read *Alexander*'s broadly worded statements that "there can be no prospective waiver of an employee's rights under Title VII," (415 U.S. at p. 51 [39 L.Ed.2d at p. 160]) and to the effect that arbitral decisions are less worthy than judicial decisions *Id.* at pp. 51-54, 56-59 [39 L.Ed.2d at pp. 159-164]) as being confined in

their application to the collective bargaining process.

Taking this reading of *Alexander*, we do not agree with *Swenson's* announcement that Alexander "turned not on the fact that a collective bargaining arbitration was involved, but instead on the unique nature of Title VII." (*Swenson, supra,* 858 F.2d at p. 1306.) We think *Alexander* turned on *both* the

aspects of collective bargaining and the unique nature of title VII rights involved in the case. (See *Electrical Workers v. Robbins & Myers, Inc. supra*, 429 U.s. 229, 236 [50 L.Ed.2d 427, 435].)

In summary, under recent pronouncements of the United States Supreme Court concerning the strong federal policy requiring arbitration of agreements to arbitrate that involve interstate commerce and the deference that is due an arbitral decision, we conclude federal law requires arbitration of this state-law-grounded claim of employment discrimination based on sex under the privately negotiated arbitration agreement here in question.[9]

A recent California decision lends support o this conclusion. In *Baker v. California State Labor Commissioner* (1989) 216 Cal.App.3d 1259 [265

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[9]There is no question that the clause we consider meets the threshold inquiry of whether the parties agreed to arbitrate. (See *Mitsubishi, supra,* 473 U.S. at p. 626 [87 L.Ed.2d at pp. 454-455].)

Cal.Rptr. 381], the court held that under the FAA a state-grounded claim for overtime pay was subject to compulsory arbitration under a private agreement to arbitrate within interstate commerce. *Baker* reviews federal law concerning arbitrability and states: "Baker sates that her right to overtime pay is not based on any contractual right but has been conferred upon her by the Legislature. (See Lab. Code section 510; *Aubry v. Goldhor* (1988) 201 Cal.App.3d 399, 404 [247 Cal.Rptr. 205].) Therefore, she argues, her overtime pay claim is independent of any employment-related claim and may not be waived by an agreement to arbitrate. We disagree. Construction of the valid arbitration agreement presented here is governed by section 2 of the Federal Arbitration Act which favors strongly the enforcement of such agreements. The Federal Arbitration Act preempts our state law in this area." (216 Cal.App.2d at pp. 1266-1267.)

Baker then describes the *Barrentine* case, *supra*, 450 U.S. 728, distinguishes it, and concludes as follows: "*Barrentine* is readily distinguishable form the instant case. In the first instance, *Barrentine* did not involve the preemption of a state statute by a conflicting federal statute. The conflict in *Barrentine* concerned the competing interests under two federal statutes.

"Moreover, the court's rationale for determining the nonarbitrability of FLSA claims is not present in the case here. As Collective bargaining does not come into play in the instant case, there is no concern about a Union's less than

vigorous pursuit of Baker's claim in the arbitration process. She would have complete control over the presentation and advocacy of her overtime claim in arbitration. Second, any potential complexity in an overtime pay claim, standing alone, does not suffice t ocounter the strong polices behind the Federal Arbitration Act favoring arbitration of this dispute. (See *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 633.) Finally, unlike the FLSA claim at issue in *Barrentine,* under the broad language of rule 347, as read into the U-4 form here,

an arbitrator is empowered to grant Baker the relief requested, if warranted.

"*Resolution of Baker's overtime pay claim by arbitration does not deprive her of her substantive rights.* It only *changes the forum in which they will be resolved.* (See *Mitsubishi Motors v. soler Chrysler-Plymouth, supra,* 473 U.S. at p. 628.)" (216 Cal.App.3d at pp. 1267-1268, italics added.)

What *Baker* says about *Barrentine* applies with equal force to *Alexander.* Neither case by our highest court bars an order compelling arbitration as required by the FAA in this case.

Touching briefly on one final point, in her respondent's briefs Cook asserts Barratt waived any right it had to arbitrate this dispute. The trial court expressly found there was no waiver. As a reviewing court looking at the record in support of the trial court's factual determinations if supported by substantial evidence, we must uphold the trial court's

determination as having such evidentiary support.

Pursuant to Barratt's motion, the trial court must stay the proceedings in the superior court and order the parties to arbitrate the matter.

DISPOSITION

Order reversed and remanded for further proceedings consistent with the views expressed in this opinion.

Froehlich, J., and Nares, J., concurred.

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

SHARON E. COOK,

Plaintiff,

v.

BARRATT AMERICAN, INC., a California corporation; MICHAEL PATTISON and BRIAN ANGELINI, both individually and as agents of Barratt, and DOES 1 through 10,

Defendants.

CASE NO. 599183

ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS

Defendants' motion to compel arbitration and stay proceedings came on regularly for hearing at 1:30 p.m. on October 27, 1988 in Department 35 of this Court, the Honorable Robert E. May presiding. David F. Faustmann, Latham & Watkins, appeared for defendants. Marie A. Backes, Backes & Friesen,

appeared for plaintiff Sharon E. Cook. Having read the moving, opposing, and supplemental papers of the parties, and having heard oral argument thereon,

IT IS ORDERED THAT:

1. Defendants have not engaged in conduct inconsistent with the arbitration agreement between the parties and have not waived the right to seek to compel arbitration of this matter;

2. Defendants' motion to compel arbitration of plaintiff's gender-related pregnancy claim, made pursuant to California Government Code section 12940 *et seq.*, is denied. This Court finds persuasive the reasoning of *Swenson v. Management Recruiters International, Inc.*, No. 87-5465, slip op. (8th Cir. Oct. 5, 1988) that a state statutory employment discrimination claim is exempt from arbitration under the Federal Arbitration Act. No other claim is presented by plaintiff in this lawsuit.

IT IS SO ORDERED.

Dated: November 18, 1988

Robert E. May, Judge
JUDGE OF THE SUPERIOR COURT

APPENDIX D

COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

SHARON E. COOK,

Plaintiff and Respondent,

v.

BARRATT AMERICAN, INC., a California corporation, and BRIAN ANGELINI, individually and as an agent of BARRATT, and DOES 1 through 10,

Defendants and Appellants.

COURT OF APPEAL NO. D009203

EXCERPTS FROM APPELLANTS' OPENING BRIEF

II.

STATEMENT OF THE CASE

A. Plaintiff signed Employment Agreements Requiring Arbitration of Employment-Related Disputes With Her Employer.

Barratt has long been a visible and respected builder of residential housing in California. Many of Barratt's most successful projects are located in San Diego County. . . .

APPENDIX E

STATUTORY PROVISIONS INVOLVED

California Government Code Section 12940 provides:

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race religious creed, color, national origin, ancestry, physical handicap, mental condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions or privileges of employment.

California Government Code Section 12945 provides:

It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:

(a) For any employer, because of the pregnancy, childbirth, or related medical condition of any female employee, to refuse to promote her, or refuse to

select her for a training program leading to promotion, provided she is able to complete the training program at least three months prior to the anticipated date of departure for her pregnancy leave, or to discharge her from employment or from a training program leading to promotion, or to discriminate against her in compensation or in terms, conditions, or privileges of employment.

(b) for any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions either:

(1) To receive the same benefits or privileges of employment granted by that employer to other persons not so affected who are similar in their ability or inability to work, including to take disability or sick leave or any other accrued leave which is made available by the employer to temporarily disabled employees. For purposes of this section, pregnancy, childbirth, and related medical conditions are treated as any other temporary disability. However, no employer shall be required to provide a female employee disability leave on account of normal pregnancy, childbirth or related medical condition for period exceeding six weeks. Nothing in this section shall be construed to require an employer to provide his or her employees with health insurance coverage for the medical costs of pregnancy, childbirth, or related medical conditions. The inclusion in any such health insurance coverage of any provisions or coverage relating to medical costs of pregnancy, childbirth, or related medical conditions shall not be construed to required the

inclusion of any other provisions or coverage, nor shall coverage of any related medical conditions be required by virtue of coverage of any medical costs of pregnancy, childbirth, or other related medical conditions.

(2) To take a leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. Such employee shall be entitled to utilize any accrued vacation leave during this period of time. Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions. Nothing herein shall be construed to limit the provisions of paragraph (1) of subdivision (b).

An employer may require any employee who plans to take a leave pursuant to this subdivision to give the employer reasonable notice of the date such leave shall commence and the estimated duration of such leave.

(c)(1) For an employer who has a policy, practice, or collective bargaining agreement requiring or authorizing the transfer of temporarily disable employees to less strenuous or hazardous positions for the duration of the disability to refuse to transfer a pregnant female employee who so requests.

(2) For any employer to refuse to temporarily transfer a pregnant female employee to a less strenuous or hazardous position of the duration of her pregnancy if she so requests, with the advice of

her physician, where such transfer can be reasonably accommodated, provided, however, that no employer shall be required by this section to create additional employment which the employer would not otherwise have created, nor shall such employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job.

(d) This section shall not be construed to affect any other provision of law relating to sex discrimination or pregnancy.

(e) The provision of this section, except paragraph (2) of subdivision (b), shall be inapplicable to any employer subject to Title VII of the federal Civil Rights Act of 1964.

The relevant sections of Title 42, United States Code provides:

Section 2000e-2

Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or

national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The relevant sections of Title 9, United States Code provides:

Section 2.

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 4.

Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof;

hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United Stated district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be mad in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matte in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner

provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in the proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of San Diego; I am over the age of eighteen years and not a party to the within action; my business address is: 2044 First Avenue, Suite 201, San Diego, California 92101.

On October 29, 1990, I served the within Petition for Writ of Certiorari in re: "Cook vs. Barratt American, Inc. and Brian Angelini" in the United States Supreme Court, October Term 1990, No. _, by placing 40 copies thereof in a box with postage fully prepaid, and delivering to the United States post office a San Diego, California, addressed as follows:

United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

On the respondents Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at San Diego, California, addressed as follows:

David F. Faustman, Esq.
Victoria L. Chaffin, Esq.
701 B Street, Suite 2100
San Diego, California 92101

Court of Appeal of the
State of California
Fourth Appellate District
750 B Street, Suite 5000
San Diego, California 94102

All Parties to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on October 29, 1990, at San Diego, California

_____

Karl Sorenson

Supreme Court, U.S.
FILED
NOV 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-702

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SHARON E. COOK,
Petitioner,
vs.
BARRATT AMERICAN, INC., and
BRIAN ANGELINI,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION ONE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a nonunion employee's individually accepted agreement to arbitrate a state-law discrimination claim against her employer is enforceable under the Federal Arbitration Act, 9 U.S.C. Sections 1, *et seq*.

RULE 29.1 LIST

Barratt Developments PLC is a parent company of Respondent Barratt American, Inc. Respondent Barratt American, Inc. has no other parent companies or subsidiaries (except wholly owned subsidiaries).

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No. 90-702

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

SHARON E. COOK,
Petitioner,
vs.
BARRATT AMERICAN, INC., and BRIAN ANGELINI,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Barratt American, Inc. ("Barratt") and Brian Angelini (collectively, "Respondents") respectfully oppose the petition for a writ of certiorari (the "Petition") to the California Court of Appeal, Fourth Appellate District (the "Court of Appeal") filed by petitioner Sharon E. Cook ("Cook" or "Petitioner") which was received by Respondents on November 3, 1990.

OPINIONS BELOW

The opinion of the State of California Court of Appeal, Fourth Appellate District, Division One, *Cook v. Barratt American, Inc.*, was initially reported at 219 Cal.App.3d 1004 (1990). A copy of this opinion was

attached to the Petition as Appendix B. This opinion was subsequently ordered "depublished" by the California Supreme Court. Accordingly, pursuant to California Rule of Court 977, the opinion cannot be cited or relied on by a court or a party in another action or proceeding except in very limited circumstances, as is further explained, *infra*. The order of the California Supreme Court denying Cook's petition for review is not reported. A copy of this order was not attached to the Petition; accordingly, a copy of this order is reprinted at Appendix A hereto.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

This case involves the California Fair Employment and Housing Act, California Government Code sections 12900, *et seq*. and the Federal Arbitration Act, 9 U.S.C. sections 1, *et seq*. Copies of the relevant statutes were attached to the Petition as Appendix E.

STATEMENT OF THE CASE

Barratt hired Cook as a new home sales representative on August 1, 1986. On August 8, 1986, Cook read and signed Barratt's standard sales representative employment contract which contained an agreement to submit to arbitration "[a]ny controversy between Broker [Barratt] and Salesperson [Cook] involving . . . the employment of Salesperson," with the decision of the arbitrators to be

"final and conclusive."[1] The employment agreement had a one year term. In July 1987, following expiration of her first employment contract, Cook read and signed another employment agreement for a six-month term running through December 1987. This employment agreement contained an arbitration agreement that was identical to the one in the August 1986 agreement.

In December 1987 Cook resigned her employment. Despite her contractual obligation to arbitrate employment-related claims, Cook filed a complaint against Respondents in the San Diego County Superior Court on May 13, 1988. Three causes of action were alleged in the action: "constructive discharge;" intentional infliction of emotional distress; and pregnancy discrimination in violation of the California Fair

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[1] The arbitration provision in the employment agreement reads as follows:

> "16.1 *Any controversy between Broker and Salesperson involving* the construction or application of any of the terms, provisions, or conditions of this Agreement, or *the employment of Salesperson, shall, on the written request of either party be submitted to arbitration* and such arbitration shall comply with and be governed by the provisions of the California Arbitration Act, beginning at Section 1280 of the California Code of Civil Procedure. The Broker and Salesperson shall each appoint one person to hear and determine the dispute and, if they are unable to agree, then the two persons so chosen shall select a third impartial arbitrator whose *decision shall be final and conclusive upon both parties.* The cost of arbitration shall be borne by the losing party or in such proportion as the arbitrators shall decide." (Emphasis added).

Employment and Housing Act ("FEHA"), California Government Code sections 12940, *et seq.*

In September 1988, Respondents filed a motion in Superior Court to compel arbitration and stay court proceedings pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. sections 1, *et seq.*, and California law. On October 27, 1988, the court denied Respondents' motion and held that Cook's state law discrimination claim was exempt from arbitration under the FAA. Respondents appealed this decision. On April 23, 1990, the Court of Appeal reversed the decision of the Superior Court, and held that the FAA required that the arbitration clause be given effect.

On June 4, 1990, Cook filed a petition for review of the Court of Appeal decision with the California Supreme Court. On July 11, 1990, the California Supreme Court denied the petition to review the Court of Appeal decision and also ordered that the Court of Appeal opinion not be published.

REASONS WHY A WRIT SHOULD NOT BE GRANTED

I.

Petitioner Is Requesting That This Court Review A Lower State Court Opinion That Has No Precedential Effect.

Petitioner requests that this Court review a decision of the intermediate California Court of Appeal. Because the California Supreme Court declined to review the decision of the Court of Appeal, California's highest court has not yet ruled on the issue of whether a

nonunion employee's discrimination claims brought pursuant to the California Fair Employment and Housing Act must be arbitrated pursuant to a private arbitration agreement.

Moreover, the California Supreme Court ordered that the Court of Appeal's opinion be "depublished."[2] Accordingly, the opinion cannot be "cited or relied on by a court or a party in any other action or proceeding except . . . (1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or (2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding." California Rule of Court 977. The *Cook* opinion therefore has no value as a precedent, and is only of interest to the parties involved in the instant litigation.

II.

The Court Of Appeal Correctly Held That Cook's State Law Based Employment Claims Must Be Compelled To Arbitration.

In reaching its decision that Cook's state law claims of employment discrimination must be compelled to arbitration, the Court of Appeal carefully considered the relevant case law, including the recent series of

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[2] Of note, California Rule of Court 979(e) provides that "[a]n order of the Supreme Court directing depublication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any law set forth in the opinion."

decisions of the United States Supreme Court emphasizing the strong federal policy of enforcing arbitration agreements. It noted that this Court had held that " 'Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.' " *Cook*, Petition, Appendix B at 10a, 219 Cal.App.3d at 1009 (quoting *Perry v. Thomas*, 482 U.S. 483, 489, 96 L.Ed.2d 426, 435, 107 S.Ct. 2520, 2525 (1987)). It also cited the United States Supreme Court's observations in *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 104 L.Ed.2d 526, 534, 109 S.Ct. 1917, 1920 (1989) that " 'the old judicial hostility to arbitration' " has eroded over the years and that " '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.' " *Cook*, Petition, Appendix B at 12a, 219 Cal.App.3d at 1010.

The Court of Appeal also correctly noted that the FAA mandates enforcement of agreements to arbitrate statutory claims, and that although this mandate can be overridden by a contrary Congressional command, the " 'burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory right at issue.' " *Cook*, Petition, Appendix B at 14a, 219 Cal.App.3d at 1011 (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227, 96 L.Ed.2d 185, 194, 107 S.Ct. 2332 (1987)). The court in *Cook* thus concluded:

> Considering the strong federal policy to enforce arbitration agreements and the intensified erosion of judicial suspicion about the competence of

> arbitrators to provide for the parties' substantive rights in accord with the applicable law, and considering the absence of any indication in statutory text or history of a congressional indication of intent to preclude a waiver of judicial remedies at least in the first adjudicatory forum of arbitration, we have concluded Cook has not carried her burden of showing the matter is not arbitrable.

Cook, Petition, Appendix B at 14a, 219 Cal.App.3d at 1011.

The Court of Appeal also properly distinguished this Court's decisions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 39 L.Ed.2d 147, 94 S.Ct. 1011 (1974) and *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 67 L.Ed.2d 641, 101 S.Ct. 1437 (1981). In *Alexander*, this Court considered the issue of "the proper relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements in the resolution and enforcement of an individual's rights to equal employment opportunities" under Title VII of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000e, *et seq.*, ("Title VII"), 415 U.S. at 38, 94 S.Ct. at 1015. This Court held that "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII." *Id.* at 415 U.S. 59-60.

Similarly, in *Barrentine*, union employees submitted claims for withheld compensation to the grievance-arbitration procedure in their collective bargaining agreement. 450 U.S. at 730-31, 101 S.Ct. at 1439-40. When denied, the employees filed an action in federal court pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, alleging violation of minimum wage standards. Relying upon *Alexander*, the Court held that prior submissions of the wage claim to the dispute resolution procedure under the union contract did not preclude the FLSA claim in federal court. 450 U.S. at 745-46, 101 S.Ct. at 1447.

Accordingly, in both *Alexander* and *Barrentine*, this Court faced and resolved the tension between collective bargaining with the employer and individual employment rights protected by federal law. As this Court noted in *Alexander*, "the union's exclusive control over the manner and extent to which an individual grievance is presented" might deprive an employment discrimination claimant of a full and fair opportunity to prosecute such claims in an arbitration pursuant to a collective bargaining agreement. 415 U.S. at 58 n.19, 94 S.Ct. at 1024 n.19.

In the case of an individually negotiated arbitration agreement, however, there is no such danger that an employee would be foreclosed from fairly and completely prosecuting his or her discrimination claim through arbitration. In this action, Cook has the opportunity to present her employment discrimination claim independently and through counsel of her choice, unimpeded by the possible conflicting responsibilities of a union as in *Alexander* and *Barrentine*. Therefore, the Court of Appeal in *Cook* properly concluded that because of the crucial union context that was present in *Alexander* and *Barrentine*, those decisions were not

controlling in the instant action. *Cook*, Petition, Appendix B at 21a, 219 Cal.App.3d at 1015.

III.

The Court Of Appeal Did Not Erroneously Distinguish Between Claims Brought Under Title VII And Those Brought Under Parallel State Statutes.

Petitioner contends that the Court of Appeal erroneously distinguished between claims brought under Title VII and those brought under the parallel state statutory scheme. Specifically, she argues that the *Cook* opinion compels arbitration for claims brought under the state anti-discrimination laws but not those brought pursuant to Title VII. See Petition at 13a. This contention is totally without merit because the *Cook* opinion makes no such distinction. Rather, the Court of Appeal decided the specific issue before it by holding that Cook's state law based claims of employment discrimination based on sex must be arbitrated pursuant to the arbitration agreement Cook entered into; the Court of Appeal did not decide the issue of whether any discrimination claims brought pursuant to federal law should also be compelled to arbitration because that issue was not before the court.

In any event, the Court of Appeal did not indicate in its opinion that discrimination claims brought pursuant to federal law would be treated any differently from claims brought pursuant to state law. In fact, the court's holding that Cook's state law claims must be arbitrated may support the conclusion that federal statutory

discrimination claims should also be compelled to arbitration.

IV.

Petitioner's Argument About The Federal Arbitration Act's Interstate Commerce Requirement Is Without Merit.

Cook also contends that the Court of Appeals' decision should be reviewed because the court erroneously applied the FAA although the act's jurisdictional requirement of involvement in interstate commerce had not been met.[3] Petition at 17a. This argument does not constitute a proper ground for this Court's granting a writ of certiorari in this case. In addition, in making this argument, Cook miscites the pleadings in this action. Specifically, in her attempt to convince this Court to grant review of this case because the FAA's jurisdictional requirements were not met, she contends that Barratt "expressly conceded its business was that of selling homes in California." Petition at 17a. However, Barratt never conceded that it *only* sold homes in

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[3] The FAA mandates enforcement of all arbitration provisions found in valid written contracts that involve interstate commerce:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of the contract.

9 U.S.C. § 2.

California or that its activities had no involvement with interstate commerce. To the contrary, from the very beginning of this litigation, Respondents asserted that the interstate commerce requirement was met. For example, in their Memorandum of Points and Authorities in Support of Defendants' Motion to Compel Arbitration and Stay Court Proceedings at pp. 8-10, Respondents explained:

> Contracts of employment are routinely considered contracts 'evidencing a transaction involving commerce.' 9 U.S.C. § 2. *See, e.g., Thorup v. Dean Witter Reynolds, Inc.*, 180 Cal.App.3d 228 (1986) (FAA applied in California court where plaintiff, former account executive, sued employer brokerage firm for wrongful termination of employment contract) .... Further, the sale of residential property, for which Barratt hired plaintiffs, affects interstate commerce significantly .... Barratt advertises its homes in states other than California, as well as in international markets, and many buyers of Barratt's homes, as well as other residential property in California, are from other states and other countries.

As the Court of Appeal noted, Cook never raised the question of whether her employment contract involved interstate commerce until she filed a petition for rehearing of the Court of Appeal decision. The Court of Appeal thus properly concluded that her belated attempt to raise this issue for the first time in her Petition for Rehearing should be rejected. See Court of Appeal

Order Modifying Opinion and Denying Petition for Rehearing (which is reprinted at Appendix B hereto).

V.

The Cook Decision Has Not Created Irreconcilable Differences Among The California Appellate Courts.

In order to support her argument that the courts have reached inconsistent results on the issue of whether arbitration clauses in private employment agreements will be enforced, Petitioner argues that *Cook* and another California appellate decision, *Hall v. Nomura Secur. Int'l.*, 219 Cal.App.3d 43, 268 Cal.Rptr. 45 (1990), "came to inconsistent results." Petition at 6a. Specifically, Petitioner asserts that in *Hall* "the court held employees need *not* arbitrate their state employment discrimination claims under private employment agreements if the right in issue is protected under Title VII." Petition at 6a. This statement mischaracterizes the decision in *Hall*.

In *Hall*, the Court of Appeal considered whether an employee's claims that he was wrongfully terminated because of his age and medical condition in violation of FEHA must be compelled to arbitration pursuant to an arbitration agreement that the employee had signed. The employee's principal argument on appeal was that because his cause of action was statutorily based, he was not bound by the arbitration agreement. 219 Cal.App.3d at 48. The Court of Appeal rejected the employee's arguments, and held that his claims concerning unlawful employment practices under FEHA must be compelled to arbitration pursuant to the FAA. *Id.* at 49-50. Thus, the

unanimous holding of *Hall* is completely consistent with the holding of the Court of Appeal in the instant case; in both cases, the courts held that the employees' state law claims concerning alleged unlawful employment practices must be compelled to arbitration.[4]

Moreover, another California appellate decision also supports the *Cook* decision. Specifically, in *Baker v. Aubry*, 216 Cal.App.3d 1259, 265 Cal.Rptr. 381 (1989), *cert. denied*, __ U.S. __, 112 L.Ed.2d 40, 111 S.Ct. 66 (1990), the court held that under the FAA, a claim for overtime pay under state law was subject to compulsory arbitration pursuant to a private arbitration agreement. In reaching this conclusion, the court rejected an employee's contention that because her right to overtime pay is statutory in nature, it may not be waived by an agreement to arbitrate. The court in *Baker* concluded that the FAA preempts the relevant California Labor Code provisions, and that the FAA, which strongly favors the enforcement of arbitration agreements, requires that the employee's claims be arbitrated. *Id.* at 1266-67.

Accordingly, there is no split in the California Courts of Appeal. Rather, the Courts of Appeal in *Cook, Hall*, and *Baker* have distinguished *Alexander* and *Barrentine*, and have consistently held that California employment statutes are preempted by the FAA and that employees' agreements to arbitrate employment-related disputes will

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[4] While the court in *Hall* quoted language from the opinion of the Federal Court of Appeals for the Eight Circuit in *Swenson v. Management Recruiters International, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, ___U.S. ___, 110 S.Ct. 143, 107 L.Ed.2d 102 (1989), in which the Eighth Circuit concluded that judicial enforcement of Title VII and Minnesota state employment claims based on race and sex is not precluded by the FAA, the Court of Appeal in *Hall* did not follow the rationale and holding of *Swenson*.

be given effect in light of the strong federal policy in favor of arbitration.

VI.

This Court's Granting Review Of The Decision In *Gilmer v. Interstate/ Johnson Lane Corp.* Does Not Mandate That Review Be Granted In The Instant Case.

On October 1, 1990, this Court granted review in *Gilmer v. Interstate/Johnson Lane Corp.*, No. 90-18, to consider the issue of whether claims brought pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, may be subjected to compulsory arbitration pursuant to an employment agreement. 59 U.S.L.W. 1049 (October 2, 1990). In the federal appellate decision below in *Gilmer*, 895 F.2d 195 (4th Cir. 1990), the court held that an employee's claim for violation of ADEA could be compelled to arbitration pursuant to an agreement between the employee and his employer which required arbitration of all claims arising out of employment. This decision was squarely in conflict with the Third Circuit's opinion in *Nicholson v. CPC International, Inc.*, 877 F.2d 221 (1989) (holding that the FAA does not require ADEA claims to be arbitrated pursuant to a private arbitration agreement).

The question of whether ADEA claims may be subjected to compulsory arbitration is not an issue in the instant litigation. Consequently, *Gilmer* is not directly controlling here. *Cf. Swenson v. Management Recruiters International, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, __ U.S. __, 110 S.Ct. 143, 107 L.Ed.2d 102 (1989) (holding that the FAA does not require

employment discrimination claims brought pursuant to Title VII and Minnesota state law to be arbitrated pursuant to a private arbitration agreement). Although the same general principles may apply to resolving the issue of whether ADEA claims may be subjected to compulsory arbitration in *Gilmer* and the issue of whether California FEHA claims may be subjected to compulsory arbitration in the instant action, this Court has previously indicated that it is necessary to conduct a separate inquiry into each statutory scheme. Specifically, this Court has explained that the courts must examine the statutory scheme at issue in order to ascertain whether Congress intended "to preclude a waiver of judicial remedies for the statutory rights at issue," and that this determination must be made " 'from [the statute's] text or legislative history' " of the statute or from " '. . . an inherent conflict between arbitration and the statute's underlying purposes.' " *Shearson*, 107 S.Ct. at 2337 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 3355 (1985)). Consequently, because different statutory schemes are at issue in *Gilmer* and in the instant case, the fact that this Court granted review in *Gilmer* does not mandate that it also grant review in this case or that it hold this case pending resolution of *Gilmer*.

VII.

In The Alternative, If This Court Decides That It Is Not Appropriate To Deny The Petition For Certiorari In This Case In Light Of *Gilmer*, Respondents Respectfully Request That The Instant Action Be Consolidated With *Gilmer*.

Alternatively, Respondents respectfully request that the instant action be consolidated with *Gilmer* if this Court decides that it is not appropriate to deny the petition for writ of certiorari in this case in light of this Court's grant of review in *Gilmer*. Because the same general principles may apply to the examination of the two discrete statutory schemes at issue in *Gilmer* and the instant case, it may be most expedient for this Court to decide the two issues at the same time.

CONCLUSION

Respondents Barratt American, Inc. and Brian Angelini respectfully request that Cook's petition for a writ of certiorari be denied.

DATED: November 28, 1990

Respectfully submitted,

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Attorneys for Respondents
BARRATT AMERICAN, INC.,
and BRIAN ANGELINI

APPENDIX A

APPENDIX A

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
Fourth Appellate District, Division One,
No. D009230 - S015941

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
JUL 11 1990
Robert Wandruff Clerk
Deputy

SHARON E. COOK et al., Respondents
v.
BARRATT AMERICAN INCORPORATED
ETC. et al., Appellants

Respondents' petition for review DENIED.

Mosk, J. and Broussard, J. are of the opinion the petition should be granted.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed April 23, 1990, which appears at 219 Cal.App.3d 1004. (Cal. Const., Art. VI, Section 14; Rule 976, Cal Rules of Court.)

PANELLI
Acting Chief Justice

APPENDIX B

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

FILED
Stephen M. Kelly Clerk
MAY 21 1990
Court Of Appeal Fourth District

SHARON E. COOK et al.,
Plaintiffs and Respondents,
v.
BARRATT AMERICAN, INC.,
etc., et al.,
Defendants and Appellants.

ORDER MODIFYING OPINION AND
DENYING PETITION FOR REHEARING
D009203
(Super. Ct. No. 599183)

THE COURT:

The opinion filed on April 23, 1990, is modified as follows:

1. On page 7, the text of footnote 5 is deleted and the following text is substituted therefor: Until Cook filed a petition for rehearing in this case, there was no question raised that the employment contract involves interstate commerce and is not subject to revocation. In the petition for rehearing, for the first time in this case, Cook raises an issue about involvement in interstate commerce. (See *McLain v. Real Estate Bd. of New Orleans* (1979) 444 U.S. 232; cf. *Bernhardt v. Polygraphic Company of America* (1956) 350 U.S. 198.)

By Cook's silence on this point until the filing of the petition for rehearing, the question has been waived. (See *Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 117; *In re Joseph E.* (1981) 124 Cal.App.3d 653, 657.).

2. On page 22, after the second full paragraph, insert the following new paragraph: Pursuant to Barratt's motion, the trial court must stay the proceedings in the superior court and order the parties to arbitrate the matter.

3. On page 22, the Disposition sentence should now read: Order reversed and remanded for further proceedings consistent with the views expressed in this opinion.

The petition for rehearing is denied.

/s/ Todd
TODD, Acting P.J.

Copies to: All parties